

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	NO. _____
	)	
	)	18 U.S.C. § 2
	)	18 U.S.C. § 371
v.	)	18 U.S.C. § 664
	)	18 U.S.C. § 1343
[1] L. BRIAN WHITFIELD	)	18 U.S.C. § 1957
(Counts One through Fifteen)	)	26 U.S.C. § 7206(1)
	)	
[2] MARSHA T. WHITFIELD	)	
(Count One through Seven; Twelve through	)	
Fifteen)	)	
	)	
[3] D. EDWIN TODD	)	
(Count One)	)	

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES:

At times material to this Indictment:

I. Background

A. Sommet and defendants

1. The Sommet Group, LLC, formerly known as the Personnel Department, (collectively, “Sommet”) was a human-resources outsourcing or “employee leasing” company based in Nashville, Tennessee. Among its purported services, Sommet processed business clients’ payrolls and provided health-insurance and 401(k) plans to clients.

2. [1] L. BRIAN WHITFIELD was a co-founder and co-managing partner of Sommet. In that role, he handled or oversaw the operations and financial management of Sommet.

3. [2] MARSHA T. WHITFIELD was the vice president of Sommet's payroll department. In that role, she handled or oversaw the receipt and distribution of the weekly payroll of Sommet's clients and the filing of state and federal tax returns.

4. [3] D. EDWIN TODD was a co-founder and co-managing partner of Sommet. In that role, he primarily handled sales and business development.

5. Employee A was an employee of Sommet who worked in its payroll department.

6. The "Sommet Business Units" were several companies that Sommet created or acquired. They offered different goods and services that were not directly related to Sommet's core payroll-processing business. The Business Units included BrandCentrik, Inc.; Cherry Hart, LLC; EMG Communications; Sommet Insurance and Risk Management; and IT Xpress Solutions.

#### B. Other entities and terms

7. The Internal Revenue Service ("IRS") was an agency of the United States Department of Treasury responsible for enforcing and administering the tax laws of the United States and collecting taxes owed to the Treasury of the United States.

8. The Employer's Quarterly Federal Tax Return, IRS Form 941, was the federal tax return that most employers use to report "employment taxes." Federal law requires employers to withhold from employees' paychecks certain amounts for the federal income tax, Federal Insurance Contributions Act ("FICA") tax (which includes social security and Medicare). Federal law also requires employers to pay the employer's portion of FICA taxes.

9. The Employee's Wage and Tax Statement, IRS Form W-2, reports for each employee from whom income, social security, or Medicare tax was withheld. With certain exceptions, every employer engaged in a trade or business who pays remuneration for services performed by an employee must file a Form W-2.

10. An Employer Identification Number ("EIN"), sometimes referred to as a Federal Tax Identification Number, is a number assigned by the IRS to identify a business entity.

11. Automated Clearing House ("ACH") was an electronic network used by banks and businesses, including Sommet, to process large volumes of credit and debit transactions. ACH transactions are transmitted electronically and generally processed in large batches to reduce processing costs. These transactions must be processed through one of the network's clearinghouses, none of which are in the state of Tennessee. As a result, any ACH transaction whose destination is within Tennessee must pass outside the state regardless of where it originated.

C. Overview of Sommet's purported business

12. Sommet offered payroll preparation and processing services to its clients. In general, Sommet's business purported to work as follows: For a given time period, business clients would pay to Sommet (a) the gross payroll for their employees and (b) the employer portion of taxes and health insurance, 401(k), or other fees or contributions, together with the fees due to Sommet. Sommet agreed to apportion and distribute those funds to meet the clients' various tax and financial obligations. Depending on the individual client, those obligations could include:

a. Paying employee net payroll. Clients would provide Sommet certain employee information such as pay rates, hours worked, and deductions. After calculating the

amount needed to cover those payroll expenses for a given pay period, Sommet would extract the corresponding funds from a client's account via ACH or the client would wire those funds to Sommet's bank account. Sommet would then process the payroll, deduct appropriate amounts for taxes and certain employee elections, and generate paychecks (or direct deposits) reflecting the employees' net pay.

b. Paying taxes. Sommet represented to clients that it would calculate the amount of taxes owed – for both the employer and individual employees – and transmit the funds in appropriate amounts to state and federal taxing authorities. Depending on how it filed the clients' federal tax returns (Forms 941), Sommet classified clients into two groups: Professional Employer Organization (“PEO”) and Administrative Services Only (“ASO”). A PEO is a business organization that purports to acquire and direct employees formerly employed by a business client, in effect leasing them back to the business client. It also purports to assume responsibility for the tax, insurance, and other obligations pertaining to those employees.

(1) For a PEO client, Sommet represented to the client that Sommet would report to the IRS all of the client's gross wages and payroll taxes, along with the wages and taxes of all Sommet's other PEO clients, on a single Form 941 under Sommet's own EIN. Similarly, Sommet would prepare for PEO clients' employees Forms W-2 listing Sommet as their employer and using Sommet's EIN. On some occasions, to maintain a PEO client's individual EIN, Sommet would also file a Form 941 under the client's EIN reflecting zero wages and zero taxes withheld. Such returns were generally referred to as “zero returns.”

(2) For an ASO client – most of which were non-profit organizations – Sommet represented to the client that Sommet would file individual Forms 941 with the IRS for

each client under that client's own EIN. Similarly, Sommet would prepare for ASO clients' employees' Forms W-2 listing the ASO client as the employer and using the ASO client's EIN.

c. Health insurance. Sommet offered clients a group health-insurance plan that included both medical coverage and prescription-drug coverage. The Sommet health-insurance plan had over 500 participants, representing approximately 57 client companies and their employees. Participating clients' premiums (both the client's (employer) portion and the employees' portion) were to be used to pay employees' medical and prescription-drug claims and to pay for processing of those claims by a third-party administrator, a separate entity that Sommet contracted with to administer the health-insurance plan.

d. 401(k) plan. Sommet also offered clients and their clients' employees the opportunity to participate in the Sommet Group, LLC 401(k) Plan. In 2010, approximately 13 client companies and their employees participated in that plan. Participating clients' contributions (both the client's (employer) portion and employees' portion) were to be directed by Sommet to the 401(k) plan. The plan was administered through John Hancock, which kept the plan's records and funds. After Sommet would forward the funds to John Hancock, John Hancock would apply the money to each individual employee's account according to the employee's elections.

e. Other obligations. Sommet would also direct funds to various other obligations of the client or the client's employees. Such obligations included workers' compensation claims, child-support payments, and other garnishments, payments, or fees.

13. The health-insurance and 401(k) plans that Sommet offered were subject to Title I of the Employee Retirement Income Security Act of 1974 ("ERISA").

14. For its various services, Sommet usually charged clients a percentage of their gross wages.

15. The Sommet Business Units did not generate sufficient revenue to support themselves independently. As a result, Sommet funded the Business Units' payroll from other sources. For tax-filing purposes, Sommet issued Forms W-2 to the employees of the Business Units under Sommet's own EIN. Sommet was required under federal law to report the "gross wages" of the Business Units under Sommet's own EIN on a Form 941.

D. Overview of the misconduct

16. From approximately June 2008 to July 6, 2010, [1] L. BRIAN WHITFIELD, [2] MARSHA T. WHITFIELD, and [3] D. EDWIN TODD conspired, and perpetrated a scheme, to defraud clients of Sommet and others by soliciting and obtaining from clients millions of dollars under false pretenses, failing to distribute those funds as promised, and misappropriating and converting clients' funds to their own use without the knowledge or authorization of the clients.

17. Misconduct related to taxes:

a. Throughout Sommet's existence, [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD, and others acting on their behalf, told clients and prospective clients that Sommet would pay their federal and state taxes in appropriate amounts and by the applicable deadlines.

b. Sommet operated its own payroll department, which was designed to prepare and submit federal and state tax returns for Sommet and its clients. [2] MARSHA T. WHITFIELD oversaw the department's several employees and the payment of taxes. Among other employees, the payroll department staff included a payroll manager and two "tax specialists" who prepared tax returns.

c. Client funds transferred to Sommet were deposited into an account that, depending on the time, was held at Wachovia Bank (later known as Wells Fargo Bank) or Compass Bank. The only Sommet employees with signatory authority on the Wachovia account were [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD. When Sommet switched from Wachovia to Compass Bank in 2010, [1] L. BRIAN WHITFIELD, [2] MARSHA T. WHITFIELD, and [3] D. EDWIN TODD were the only Sommet employees with signatory authority on the Compass account.

d. Although the tax specialists prepared the state tax returns for all PEO and ASO clients and prepared the federal tax returns (Forms 941) for ASO clients, [2] MARSHA T. WHITFIELD told them that she and [1] L. BRIAN WHITFIELD personally would handle the Forms 941 for Sommet.

e. At [2] MARSHA T. WHITFIELD's direction, Employee A, one of the tax specialists, prepared quarterly spreadsheets to be used to prepare Sommet's Forms 941. Those spreadsheets reflected the accurate gross wages that Sommet distributed under its own EIN, including the gross wages for PEO clients, Sommet, and the Sommet Business Units. In addition, the spreadsheets accurately listed the tax liability for those same entities. [2] MARSHA T. WHITFIELD instructed Employee A never to save this spreadsheet on a public drive because it contained confidential information.

f. Employee A emailed those spreadsheets to [2] MARSHA T. WHITFIELD who, in turn, forwarded them to [1] L. BRIAN WHITFIELD. Thereafter, [1] L. BRIAN WHITFIELD or [2] MARSHA T. WHITFIELD or both prepared the Forms 941 for Sommet. Finally, [1] L. BRIAN WHITFIELD signed the Forms 941 under the penalty of perjury and filed or caused to be filed the signed forms with the IRS.

g. [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD made, with the intent to defraud clients and the IRS, misrepresentations to clients, including, among others, the following:

(1) Misrepresentations to clients regarding reporting. Contrary to their representations to clients that they would report the PEO clients' gross wages on Sommet's Form 941 and under Sommet's EIN, [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD, intentionally and with the intent to defraud the clients and the IRS, did not report to the IRS the full amount of gross wages Sommet paid on behalf of those clients. From Fourth Quarter 2008 through First Quarter 2010, Sommet paid a total of approximately \$83 million in gross wages to the employees of Sommet, the Sommet Business Units, and the PEO clients. By contrast, during that same time period, on the Form 941 filed under Sommet's EIN, Sommet reported that it paid out a total of only approximately \$4 million in gross wages. Sommet did not file any additional tax returns that reported the gross wages it paid on behalf of its PEO clients. Sommet either filed "zero return" Forms 941 under the PEO clients' EINs or did not file Forms 941 under the PEO clients' EINs at all. As [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD well knew, Sommet did not report to the IRS the full amount of gross wages Sommet paid on behalf of itself, its Business Units, and its PEO clients.

(2) Misrepresentations to clients regarding remitting. Contrary to their representations to clients that they would remit to the IRS the PEO clients' federal taxes in appropriate amounts and by the applicable deadlines, [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD, intentionally and with the intent to defraud the clients and the IRS, did not remit to the IRS the full tax liability attributable to Sommet, the Sommet Business Units, and the PEO clients. Instead, as [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD



well knew, during Fourth Quarter 2008 through First Quarter 2010, Sommet, the Sommet Business Units, and the PEO clients had a tax liability of approximately \$20 million, but remitted only approximately \$1.23 million in taxes to the IRS.

h. In addition to misrepresentations to clients, [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD prepared false federal tax returns. Specifically, for First Quarter 2009 through Fourth Quarter 2009, [1] L. BRIAN WHITFIELD or [2] MARSHA T. WHITFIELD or both prepared Forms 941 under Sommet's EIN that underreported the amount of gross wages that were paid by Sommet and the Sommet Business Units. As [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD well knew, for that time period Sommet paid approximately \$6.2 million in gross wages on behalf of itself and the Sommet Business Units but only reported approximately \$2.4 million in gross wages on the Forms 941 Sommet filed under its EIN. After the Forms 941 were prepared, [1] L. BRIAN WHITFIELD signed them under the penalty of perjury and filed them, or caused them to be filed, with the IRS.

i. When employees in the payroll department asked how Sommet's Form 941 was being handled or other follow up questions, [2] MARSHA T. WHITFIELD took steps to conceal the fraud by assuring them that she or [1] L. BRIAN WHITFIELD would take care of it and that no further follow up was necessary.

j. With respect to state tax returns, the tax specialists would routinely prepare the state forms and calculate the taxes owed. Nonetheless, when they sought approval from [2] MARSHA T. WHITFIELD to send the corresponding funds, she would tell them to delay payment or send only partial payment. As a result, penalties accrued on the clients' state tax liability.

k. In response to clients' and government agents' inquiries regarding late payment or nonpayment of taxes, [1] L. BRIAN WHITFIELD and others acting on his behalf provided false excuses and misleading explanations. For example, [1] L. BRIAN WHITFIELD attempted to mislead an IRS Revenue Officer by blaming late or non-payment of taxes on issues with lower-level Sommet employees and by claiming that money had been recently been sent. As [1] L. BRIAN WHITFIELD well knew, these excuses and explanations were false.

l. Instead of using funds from clients' gross wages to pay the clients' legitimate tax liabilities, [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD used those funds to pay Sommet's Business Units' payroll and for their personal benefit.

18. Misconduct related to health insurance:

a. Sommet offered clients a health-insurance plan in return for premiums paid by the clients and their employees. To attract new clients to Sommet, [1] L. BRIAN WHITFIELD intentionally priced Sommet's health-insurance premiums below the market rate. As [1] L. BRIAN WHITFIELD knew, the below-market premiums were insufficient to cover the amount of claims generally predicted by the insurance industry and were incapable of amassing any insurance reserves. When questioned regarding the insufficiency of premiums, [1] L. BRIAN WHITFIELD claimed that Sommet would supplement them with funds from Sommet's payroll-processing fees to ensure medical and prescription-drug claims were covered.

b. Throughout Sommet's existence, [1] L. BRIAN WHITFIELD and others acting on his behalf represented to clients and prospective clients that their employees would have their medical and prescription-drug claims paid in accordance with the plan in return for the applicable premiums.

c. Contrary to those representations, as [1] L. BRIAN WHITFIELD knew, the clients' employees' medical and prescription-drug claims would not be paid in accordance with the plan. As [1] L. BRIAN WHITFIELD knew, the premiums alone were insufficient to cover such claims by the employees, and he did not intend to supplement, and did not supplement, insurance premiums with funds from Sommet's payroll-processing fees.

d. Instead, [1] L. BRIAN WHITFIELD used the below-market insurance premiums to fraudulently induce businesses to become Sommet clients and to pay for Sommet's payroll-processing services, knowing that Sommet would not adequately fund the health-insurance plan to cover legitimate medical and prescription-drug claims.

e. Because of [1] L. BRIAN WHITFIELD's refusal to pay health-insurance claims fully and on a timely basis, Sommet's then-third-party administrator, Health First, terminated its relationship with Sommet in January 2010.

f. To conceal the true reason for that termination, and to ensure clients continued their business relationship with Sommet, [1] L. BRIAN WHITFIELD, [3] D. EDWIN TODD, and others on their behalf misrepresented to clients why Sommet was changing third-party administrators. For example, [3] D. EDWIN TODD falsely and with the intent to defraud told certain clients that the change was because Health First had discovered Sommet was considering changing third-party administrators and therefore terminated Sommet. Further, in response to client inquiries, [3] D. EDWIN TODD, purposefully and with the intent to defraud, concealed that Sommet had been terminated by Health First because Sommet had repeatedly failed to pay for legitimate medical and prescription-drug claims.

g. Although Sommet replaced Health First with a new third-party administrator, HCH, in January 2010, [1] L. BRIAN WHITFIELD continued to intentionally

refuse to make payment to cover legitimate medical and prescription-drug claims. As a result, HCH terminated its business relationship with Sommet in June 2010. As of June 24, 2010, outstanding medical and prescription-drug claims from both Health First and HCH totaled approximately \$3.8 million.

19. Misconduct related to 401(k) funds:

a. Throughout Sommet's existence, [1] L. BRIAN WHITFIELD and others acting on his behalf, told clients and prospective clients that Sommet offered a 401(k) plan and that clients' employees' deducted funds would be appropriately maintained in that plan's accounts. Contrary to their promises, [1] L. BRIAN WHITFIELD and others acting on his behalf did not, and did not intend to, fund the 401(k) plan's accounts. As a result, approximately \$44,000 of employee and employer contributions were never forwarded to the 401(k) Plan.

b. In addition, when clients questioned or complained about Sommet's late or non-funding of employees' 401(k) accounts, [2] MARSHA T. WHITFIELD, intentionally and with the intent to defraud, provided those clients false excuses and misleading explanations to conceal the true reason for the late or non-funding of the accounts.

c. Instead of directing the appropriate portion of client funds to the 401(k) plan's accounts, [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD used those funds to pay Sommet's business units' payroll and for their personal benefit.

20. Other misconduct:

a. Throughout Sommet's existence, [1] L. BRIAN WHITFIELD, [3] D. EDWIN TODD, and others acting on their behalf, told clients and prospective clients that Sommet would use client funds to pay for other financial obligations of the client or the client's employees, such as child-support payments and workers-compensation plans. Contrary to their

promises, [1] L. BRIAN WHITFIELD and others acting on his behalf did not, and did not intend to, forward those earmarked funds to the appropriate entities.

b. In addition, when clients questioned or complained about problems with employees' paychecks bouncing or related issues, [2] MARSHA T. WHITFIELD, intentionally and with the intent to defraud, provided those clients false excuses and misleading explanations to conceal the true reason for those problems.

c. Instead of directing the appropriate portion of funds from clients' gross wages to workers compensation claims and child support garnishments, [1] L. BRIAN WHITFIELD and [2] MARSHA T. WHITFIELD used those funds to pay Sommet's business units' payroll and for their personal benefit.

## II. The Conspiracy

21. From in or about June 2008 through on or about July 6, 2010, in the Middle District of Tennessee and elsewhere, [1] **L. BRIAN WHITFIELD**, [2] **MARSHA T. WHITFIELD**, and [3] **D. EDWIN TODD** did willfully, knowingly, and unlawfully combine, conspire, confederate, and agree with each other and others, known and unknown to the Grand Jury, to commit the following offenses:

a. To commit wire fraud, in violation of Title 18, United States Code, Section 1343, theft or embezzlement from an employee benefit plan, in violation of Title 18, United States Code, Section 664, and money laundering, in violation of Title 18, United States Code, Section 1957; and

b. To defraud the United States, the United States Treasury Department, and the IRS, a department and agency of the United States, by impeding, impairing, obstructing, and

defeating the lawful governmental functions of the Treasury Department and IRS in the ascertainment, computation, assessment, and collection of revenue, namely, employment taxes.

### III. Manner and Means

22. The manner and means by which [1] L. BRIAN WHITFIELD, [2] MARSHA T. WHITFIELD, and [3] D. EDWIN TODD sought to accomplish and carry out the conspiracy and the underlying scheme to defraud included the following:

- a. Would and did advise clients that they would fulfill payroll related obligations, including funding a health-insurance plan, paying health-insurance claims for medical and prescription-drug expenses, preparing and filing employment tax returns, paying taxes due, and funding employee pension benefit plans;
- b. Would and did prepare false employment tax returns underreporting taxes due and wages paid on behalf of Sommet and the Sommet Business Units;
- c. Would and did fail to file tax returns reporting the full amount of taxes due and wages paid on behalf of the PEO clients;
- d. Would and did fail to remit employment taxes due to the IRS;
- e. Would and did fail to adequately fund a health-insurance plan;
- f. Would and did fail to pay health-insurance claims fully and on a timely basis;
- g. Would and did divert client funds intended for payment of taxes, health-insurance premiums, and employee pension benefit plan contributions to their own personal benefit; and
- h. Would and did take steps to conceal the fraud.

#### IV. Overt Acts

23. In furtherance of the above conspiracy and to effect the objects and purposes thereof, [1] L. BRIAN WHITFIELD, [2] MARSHA T. WHITFIELD, and [3] D. EDWIN TODD, individually and jointly, committed one or more overt acts within the Middle District of Tennessee and elsewhere, including, among others, the following:

- a. On January 29, 2009, [2] MARSHA T. WHITFIELD forwarded [1] L. BRIAN WHITFIELD an email with a spreadsheet attached for use in preparing Sommet's 4th Quarter 2008 employer's quarterly federal tax return, Form 941;
- b. On April 30, 2009, [2] MARSHA T. WHITFIELD forwarded [1] L. BRIAN WHITFIELD an email with a spreadsheet attached for use in preparing Sommet's 1st Quarter 2009 employer's quarterly federal tax return, Form 941;
- c. On July 30, 2009, [2] MARSHA T. WHITFIELD forwarded [1] L. BRIAN WHITFIELD an email with a spreadsheet attached for use in preparing Sommet's 2nd Quarter 2009 employer's quarterly federal tax return, Form 941;
- d. On November 9, 2009, [2] MARSHA T. WHITFIELD forwarded [1] L. BRIAN WHITFIELD an email with a spreadsheet attached for use in preparing Sommet's 3rd Quarter 2009 employer's quarterly federal tax return, Form 941;
- e. On June 25, 2009, [1] L. BRIAN WHITFIELD signed and filed, or caused to be filed, Sommet's 4th Quarter 2008 employer's quarterly federal tax return, Form 941;
- f. On June 25, 2009, [1] L. BRIAN WHITFIELD signed and filed, or caused to be filed, Sommet's 1st Quarter 2009 employer's quarterly federal tax return, Form 941;

g. On December 15, 2009, [1] L. BRIAN WHITFIELD signed and filed, or caused to be filed, Sommet's 2nd Quarter 2009 employer's quarterly federal tax return, Form 941;

h. On December 15, 2009, [1] L. BRIAN WHITFIELD signed and filed, or caused to be filed, Sommet's 3rd Quarter 2009 employer's quarterly federal tax return, Form 941;

i. On January 31, 2010, [1] L. BRIAN WHITFIELD filed signed and filed, or caused to be filed, Sommet's 4th Quarter 2009 employer's quarterly federal tax return, Form 941;

j. On or about August 6, 2007, [1] L. BRIAN WHITFIELD falsely told an IRS Revenue Officer that he had mailed a check for \$30,000 to the IRS a few weeks earlier;

k. On or about June 17, 2008, [1] L. BRIAN WHITFIELD falsely told an IRS Revenue Officer that part of the reason Sommet was delinquent in making federal tax deposits was because the Sommet employee responsible for making the deposits had been fired in December 2007;

l. On or about January 8, 2010, [3] D. EDWIN TODD sent to D.A., a representative of Sommet's client Hermitage Hills Baptist Church, an email in which [3] TODD falsely stated why Sommet had changed third-party administrators;

m. On or about January 8, 2010, [3] D. EDWIN TODD sent to C.P., a representative of Sommet's client Brentwood Cool Springs Chamber of Commerce, an email in which [3] TODD falsely stated why Sommet had changed third-party administrators;

n. On January 7, 2010, [3] D. EDWIN TODD caused to be sent to ADR, Inc. a letter falsely stating that "all payroll tax withholdings from individuals employed by ADR have



been remitted to the proper state and federal tax agencies as required under the Client Services Agreement between Sommet and ADR” and enclosing certain copies of Forms 941.

In violation of Title 18, United States Code, Sections 371 and 2.

COUNTS TWO THROUGH FOUR

THE GRAND JURY FURTHER CHARGES:

1. Paragraphs 1 through 23 of Count One are hereby incorporated and realleged as if fully set forth herein.

2. From in or about June 2008 to on or about July 6, 2010, in the Middle District of Tennessee and elsewhere, [1] **L. BRIAN WHITFIELD** and [2] **MARSHA T. WHITFIELD** devised and intended to devise a scheme to defraud and to obtain money and property by means of false and fraudulent pretenses and representations, and by acts of concealment of the scheme, all as described in Paragraphs 1 through 23 of Count One, and, in furtherance thereof, used the interstate wires.

3. On or about the dates set forth below with respect to each count, in the Middle District of Tennessee and elsewhere, [1] **L. BRIAN WHITFIELD** and [2] **MARSHA T. WHITFIELD**, for the purpose of executing the aforesaid scheme, and attempting to do so, knowingly did cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, and pictures, namely:

Count	Date	Description of Interstate Wire
2	7/16/09	An ACH transmittal of \$77,593.54 from Pener's Men's Warehouse, Inc.'s bank account to Sommet's Wachovia Bank account (ending in '2014)
3	11/18/09	An ACH transmittal of \$71,497.58 from Forklift Systems' bank account to Sommet's Wachovia Bank account (ending in '2014)
4	5/5/10	A wire transfer of \$41,068.74 from Hometown Quotes, LLC's bank account to Sommet's Compass Bank account (ending in '1087)

In violation of Title 18, United States Code, Sections 1343 and 2(a).

COUNTS FIVE THROUGH SEVEN

THE GRAND JURY FURTHER CHARGES:

1. Paragraphs 1 through 23 of Count One are hereby incorporated and realleged as if fully set forth herein.

2. On or about the dates set forth below with respect to each count, in the Middle District of Tennessee, [1] **L. BRIAN WHITFIELD** and [2] **MARSHA T. WHITFIELD**, did knowingly and willfully embezzle, steal, and unlawfully and willfully abstract and convert to his own use the money, funds, securities, premiums, credits, property and assets of an employee pension benefit plan and any fund connected to the plan, such plan being subject to the provisions of Title I of the Employee Retirement Income Security Act of 1974, as follows:

Count	Date	ERISA plan	Embezzlement, theft, abstraction, and conversion
5	11/15/09	Sommet Group, LLC 401(k) Plan	Theft of employee and employer contributions totaling \$6,005.00 to the Plan on behalf of client Walick-Kemp Associates for pay periods ending 11/15/09 through 12/30/09
6	03/12/10	Sommet Group, LLC 401(k) Plan	Theft of employee and employer contributions totaling \$8,441.87 to the Plan on behalf of client U.S. Resort Management for pay periods ending 03/12/10 through 07/02/10
7	08/31/09	Sommet Group, LLC 401(k) Plan	Theft of employee and employer contributions totaling \$1,538.21 to the Plan on behalf of client Kirkland Carpet and Flooring for pay periods ending 08/31/09 through 06/30/10

In violation of Title 18, United States Code, Sections 664 and 2.

COUNTS EIGHT THROUGH ELEVEN

THE GRAND JURY FURTHER CHARGES:

1. Paragraphs 1 through 23 of Count One are hereby incorporated and realleged as if fully set forth herein.

2. On or about the dates below with respect to each count, in the Middle District of Tennessee, [1] **L. BRIAN WHITFIELD** did willfully make and subscribe an Employer's Quarterly Federal Tax Return (Form 941) for Sommet for each of the quarters set forth below, which was verified by a written declaration that it was made under the penalties of perjury, and which he did not believe to be true and correct as to every material matter in that each Form 941 underreported wages, tips, and other compensation (Line 2) and total taxes before adjustments (Line 6):

Count	Date Filed	Quarterly Return
8	6/25/09	Form 941, 1st Quarter, 2009
9	12/15/09	Form 941, 2nd Quarter, 2009
10	12/15/09	Form 941, 3rd Quarter, 2009
11	1/31/10	Form 941, 4th Quarter, 2009

In violation of Title 26, United States Code, Section 7206(1) and Title 18, United States Code, Section 2.

COUNTS TWELVE THROUGH FIFTEEN

THE GRAND JURY FURTHER CHARGES:

1. Paragraphs 1 through 23 of Count One are hereby incorporated and realleged as if fully set forth herein.

2. On or about the dates set forth below with respect to each count, in the Middle District of Tennessee and elsewhere, [1] **L. BRIAN WHITFIELD** and [2] **MARSHA T. WHITFIELD** did knowingly engage and attempt to engage in the following monetary transactions in criminally derived property of a value greater than \$10,000, affecting interstate commerce and by, through, and to a financial institution, namely, the transfer and withdrawal of funds by the means set forth below, such property having been derived from a specified unlawful activity, namely, wire fraud, in violation of Title 18, United States Code, Section 1343; and theft from an employee pension benefit plan, in violation of Title 18, United States Code, Section 664:

Count	Date	Monetary Transaction
12	7/17/09	Withdrawal of funds to pay Sommet check # 09419 (Wachovia Bank), made payable to "PNC Bank" in the amount of \$300,000, signed by L. Brian Whitfield, which funds were later used to pay for houseboat
13	8/25/09	Withdrawal of funds to pay Sommet check #9920 (Wachovia Bank), made payable to "Nashville Hockey Club Limited Partnership" in the amount of \$254,535.77, signed by Marsha T. Whitfield, which funds were payment for arena naming rights
14	11/19/09	A wire transfer of \$75,000 from Sommet's Wachovia Bank account (ending in '2014) to L. Brian and Marsha T. Whitfield's personal account at Wachovia Bank (ending in '2142), which funds were later provided to Courtyards by Elio for construction of a pool

Count	Date	Monetary Transaction
15	6/17/10	A wire transfer of \$33,413.44 from Sommet's Compass Bank account (ending in '1087) to L. Brian and Marsha T. Whitfield's personal account at Avenue Bank (ending in '2730), which funds were later provided to Akers constructions for home remodeling

In violation of Title 18, United States Code, Sections 1957 and 2.

### FORFEITURE ALLEGATION

1. All of the Paragraphs in Counts One through Seven and in Counts Twelve through Fifteen are hereby incorporated and realleged as if fully set forth herein.

2. Pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), upon conviction of any offense alleged in Count One (conspiracy, in violation of Title 18, United States Code, Section 371); Counts Two through Four (wire fraud, in violation of Title 18, United States Code, Section 1343), Counts Five through Seven (theft from an ERISA plan, in violation of Title 18, United States Code, Section 664), or Counts Twelve through Fifteen (money laundering, in violation of Title 18, United States Code, Section 1957) of this Indictment, **[1] L. BRIAN WHITFIELD, [2] MARSHA T.**

**WHITFIELD, and [3] D. EDWIN TODD** shall forfeit to the United States of America any and all property, real or personal, obtained directly or indirectly as a result of the scheme or artifice to defraud as alleged in each count, and which constitutes or is derived from proceeds traceable to each violation. The property to be forfeited includes but is not limited to a money judgment in an amount of approximately \$20 million which represents proceeds of the offenses described above.

3. If any of the property described above, as a result of any act or omission of **[1] L. BRIAN WHITFIELD, [2] MARSHA T. WHITFIELD, and [3] D. EDWIN TODD:**

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third party;
- c. has been placed beyond the jurisdiction of the court;
- d. has been substantially diminished in value; or

- e. has been commingled with other property that cannot be divided without difficulty,

the United States shall be entitled to forfeiture of substitute property. The United States intends, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1) and Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of [1] **L. BRIAN WHITFIELD**, [2] **MARSHA T. WHITFIELD**, and [3] **D. EDWIN TODD** up to the value of the property listed above as being subject to forfeiture.

A TRUE BILL

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FOREPERSON

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JERRY E MARTIN  
UNITED STATES ATTORNEY

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TY E. HOWARD  
ASSISTANT UNITED STATES ATTORNEY

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KATHRYN WARD  
TRIAL ATTORNEY, TAX DIVISION